

MEMORANDUM OF LAW

DATE: March 3, 1986
TO: Councilman Mike Gotch
FROM: City Attorney
SUBJECT: Farnum Elementary School Site - Proposed Lease
to Developer - City Right to Lease

In connection with a San Diego Unified School District proposal to enter into a ninety-nine-year lease of the former Farnum Elementary School site in Pacific Beach, questions have been raised as to what right of first refusal, if any, the City has to lease the property for playground and recreational purposes.

The applicable law is contained in Section 39390 et seq. of the Education Code of the State of California. Section 39390 et seq. was added to the State law effective January 1981. A copy of the applicable sections is attached.

Section 39390 et seq. is supplemental to the provisions of Section 54222 et seq. of the Government Code and Section 39030 et seq. of the Education Code, both of which provide the City with certain rights of first refusal with regard to surplus school properties. Section 39390 expresses the legislative intent that the City be able to acquire any surplus school sites which contain a playground, playing field or recreational area, for an amount equal to the School District's investment in such property. Section 39390 and the subsequent sections basically specify a process whereby school districts must give cities and other public agencies a first right of refusal to acquire school sites for the amount of the school district's investment, plus a cost of living adjustment, but at a price not less than twenty-five percent of present fair market value.

With regard to the leases, the annual lease payment must not exceed five percent of the maximum sale price, i.e., five percent of cost, plus cost of living adjustment, or five percent of twenty-five percent of fair market value, whichever is greater.

The Farnum School site property is arguably subject to the provisions of Section 39390 et seq. The law requires that the School District, prior to selling or leasing the school site, offer to sell or lease the site to the City. The City has sixty days, after receiving written notification from the District of its offer to sell or lease, to notify the District of the City's

intent to accept the offer. The School District, by letter dated July 12, 1985, copy attached, informed the City that it intended to lease the Farnum Elementary School site for a ninety-nine-year period. The letter enclosed a copy of the proposed bid solicitation. The solicitation specified a minimum initial annual rent of \$250,000. Neither the letter nor the solicitation of bids purported to offer the property to the City at a lease rate equal to not more than five percent of the School District's property cost as adjusted, or five percent of twenty-five percent of fair market value, whichever is greater.

A group of concerned community residents subsequently challenged the proposed lease of the property for development. This office has been asked what rights the City has, if any, at this time to require the School District to offer to lease the property to the City.

The School District, in its answer to the complaint by the local residents, has indicated that it has, in fact, complied with Section 39390 et seq. presumably by sending the attached July 12, 1985 letter with attachments to the City. The School District further has alleged that the School District is not required to comply with Section 39390 et seq. "since the relevant governmental acts of third parties necessary to trigger compliance never took place."

While it appears clear that the July 12, 1985 letter is not an offer to the City as required by the statutes, Section 39391 specifies that this particular law applies only to school sites with respect to which the following conditions exist:

(a) Either the whole or a portion of the school site consists of land which is used for school playground, playing field, or other outdoor recreational purposes and open-space land particularly suited for recreational purposes.

(b) The land described in subdivision (a) has been used for one or more of the purposes specified therein for at least eight years immediately preceding the date of the governing board's determination to sell or lease the school site.

(c) No other available publicly owned land in the vicinity of the school site is adequate to meet the existing and foreseeable needs of the community for playground, playing field, or other outdoor recreational and open-space purposes, as determined by the governing body of the public agency which proposes to purchase or lease land from the school district, pursuant to Section 39397.

Furthermore, Section 39397.5 specifies in part:

(a) No public agency may purchase surplus school property . . . pursuant to this article unless it has first adopted a plan for the purchase of surplus school property. The plan shall designate the surplus site or sites all or a portion of which the public agency desires to purchase at the price established pursuant to this article . . .

(b) Any property designated by public agencies as surplus school sites which the agencies do not wish to purchase, . . . may be sold or leased by a school district without regard to the provisions of this article.

Apparently, the School District has concluded that the City of San Diego has not made a determination that "no other available publicly owned land in the vicinity of the school site is adequate to meet the . . . needs of the community . . ." and that, therefore, the School District is not required to offer the site to the City. Also, the School District seems to be taking the position that since the City has not already "adopted a plan for the purchase of surplus school property" that it does not have to offer any surplus school property to the City at the discount price specified in Section 39396. Apparently, the closest thing the City presently has to a plan for acquiring school sites for park purposes is set forth in Council Policy 700-35. The Council Policy does not include the plan for the purchase of surplus school property. Since the City has apparently not been aware of the provisions of Section 39390 et seq., there has, of course, been no specific determination as required by Section 39391(c). The provisions of Section 39397.5 specify that the City's plan designating surplus school sites it desires to acquire must not include more than thirty percent of the total school acreage of all the sites designated as surplus. The Section further specifies that the seventy percent or more of the surplus acreage not included in the City's plan for potential acquisition can be leased or sold by the School District without first offering the property to the City at a discount price.

With regard to the issue of whether the School District must sell or lease all of the property or only the playground portion of the property to the City at the discounted price, the attached statutes allow the School District to separate the playground type area from the portion of the property improved with school buildings and to offer only the playground area to the City at the discounted price. However, the School District is not obligated to divide the property and, at its option, may offer the entire parcel to the City at the discounted price. (See Sections 39394 and 39395.)

In conclusion, it appears reasonable, if the City wishes to consider acquisition of the Farnum Elementary School site, to schedule a Council hearing to make the determination required in Section 39391, subsection (c), and to proceed with the preparation of a plan for the potential purchase or lease of surplus school properties as required under Section 39397.5.

This office has requested the School District to submit a list of its designated surplus properties so that the City can adopt a plan for a potential acquisition or lease of sites as the School District determines to make them available.

If the Council makes the determination specified in Section 39391(c), litigation may be appropriate to preserve the City's rights with regard to potential purchase or lease of the Farnum Elementary School site.

JOHN W. WITT, City Attorney

By

Harold O. Valderhaug

Deputy City Attorney

HOV:ps:950.1(x043.2)

Attachments

ML-86-23